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The Do-Not-Call List: Will It Survive?

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Abstract

Chris Kannady, a third year law student in the J.D./M.B.A. program at the University of Oklahoma College of Law, gives this overview of the do-not-call list dilemma. The Telephone Consumer Protection Act (“TCPA”) was enacted in order to protect residential telephone subscribers’ privacy rights to avoid telephone solicitations. However, in 2002, the Federal Trade Commission (“FTC”) began the process of creating the current nationwide do-not-call list that the FTC, not individual telemarketing organizations, would maintain. Within one year, the do-not-call list was finalized and ready to open for public registration. It did not take long before telemarketers filed suit to block the list. This article provides a detailed discussion of the litigation initiated by telemarketers in an attempt to invalidate the do-not-call list. Since the telemarketing industry stands to lose billions of dollars if the list continues to operate, litigation concerning this matter is likely to continue.

THE DO-NOT-CALL LIST: WILL IT SURVIVE?

Introduction

Over the past few decades, the door-to-door salesman has disappeared and the telemarketer has taken his place. In fact, telemarketing “has grown into an industry that generates \$275 billion dollars annually and employs roughly 5.4 million persons in the United States.”¹ With telemarketing dominating the market of telecommunications in such an aggressive fashion, it is no surprise that by the early 1990s the public got the attention of Congress and wheels began to turn. In 1991, Congress responded to the public protest of telemarketing practices by promulgating the Telephone Consumer Protection Act (“TCPA”).² The TCPA’s enactment ensured the protection of “residential telephone subscribers’ privacy rights to avoid telephone solicitations to which they object.”³ Congress directed the Federal Communication Commission (“FCC”) to devise regulations restricting the use of automatic

¹ Mainstream Mktg. Servs., Inc. v. Fed. Trade Comm’n, 283 F. Supp. 2d 1151, 1154 (D. Col. 2003).

² Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227 (2000)).

³ U.S. Sec. v. Fed. Trade Comm’n, 282 F. Supp. 2d 1285, 1287 (W.D. Okla. 2003); *see also* 47 U.S.C. § 227(c)(1) (2000).

telephone dialing systems by telemarketers.⁴ However, the FCC refused to create a national “do-not-call” list based on the conclusion that such a list “would not assist telephone subscribers who...would like to maintain their ability to choose among those telemarketers from whom they do and do not want to hear.”⁵ Instead, the FCC decided to circumvent the potential problems of a national do-not-call list by requiring telemarketers to adopt their own do-not-call lists.⁶ Under this system, if a telemarketer calls a consumer, the consumer can request that the telemarketer remove his telephone number from the telemarketer’s list.⁷

In 1994, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (“TCFAP”) which directed the Federal Trade Commission (“FTC”) to set rules prohibiting deceptive and abusive telemarketing acts or practices.⁸ The TCFAP’s purpose was to ensure that telemarketers refrain “from ‘undertak[ing] a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy.’”⁹ However, the act did not apply to organizations not regulated by the FTC, which includes “certain financial institutions, common carriers, air carriers and nonprofit organizations or to insurance companies...regulated by state law.”¹⁰ Subsequently, the FTC took action as directed by Congress and created the Telemarketing Sales Rule (“TSR”) in order to circumvent deceptive and abusive telemarketing practices as defined in the TCFAP.¹¹ In January 2002, the FTC underwent the process of amending the TSR¹² in order to create the current nationwide do-not-

⁴ *Id.*; *see also* 47 U.S. § 227(c)(1) (2000).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1288; *see also* 15 U.S.C. § 6102(a)(3)(A) (2000).

¹⁰ *Id.*

¹¹ *Id.*

¹² “Final Amended Rule,” 68 Fed. Reg. 4580 (2003).

call list that the FTC, not telemarketing organizations, would maintain.¹³ Within one year, the do-not-call list was finalized and ready to open for public registration.¹⁴ It did not take long before the telemarketers filed suit to block the list.

I. Administrative Power Issue

Questioning the FTC's authority to promulgate a national do-not-call list, the telemarketers claimed that Congress did not give an unambiguous grant of authority to the FTC necessary to enforce the do-not-call list.¹⁵ For example, "[i]f Congress has explicitly left a gap for the [FTC] to fill, there is an express delegation of authority to the [FTC] to elucidate a specific provision of the statute by regulation."¹⁶ In essence, if the FTC enforced the do-not-call list under the amended TSR without an unambiguous grant of authority by Congress, then the FTC has encroached upon the serious constitutional issue of abuse of power by a governmental agency. Additionally, the telemarketers claimed that the national do-not-call list violated their rights under the First and Fifth Amendments to the United States Constitution by discriminating against their "speech based upon content and identity of speakers" and by suppressing "far more speech than necessary."¹⁷ Irrespective of the telemarketers' constitutional claims, the court limited the scope of the issues in this case to just the administrative power issue, and thereby granted summary judgment for the telemarketers on this issue alone.

The court arrived at its decision to grant summary judgment by first determining whether the FTC had the authority to promulgate the do-not-call registry. First, the court conceded that "Congress expressly granted the authority to the *FCC* under the TCPA to establish and operate"

¹³ *U.S. Security*, 282 F. Supp. 2d at 1288.

¹⁴ To register on the national Do-Not-Call list, go to www.donotcall.gov.

¹⁵ *U.S. Security*, 282 F. Supp. 2d. at 1290.

¹⁶ *Id.*

¹⁷ *Id.*

a national do-not-call list.¹⁸ Congress also “charged the FTC under the TCFAP with the authority” to prevent abusive and deceptive telemarketing practices.¹⁹ However, “the TCFAP is silent as to the FTC’s authority to promulgate a do-not-call registry,” which the court found that this silence in the TCFAP makes it clear that Congress did not grant the authority to the FTC necessary to permit this agency to enact the amended TSR, the very rules necessary to establish the do-not-call list.²⁰ The FTC argued that even though the TCFAP is silent regarding its authority to create the do-not-call registry, “because the FTC has declared that any telemarketing call to a number on a do-not-call registry would be abusive, creation of such a registry is therefore permitted pursuant to its statutory authority [under the TCFAP] to regulate abusive telemarketing acts or practices.”²¹ The FTC urged that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, “[d]eference...to [the] agency’s construction of a statute that it administers is premised on the theory that a statute’s ambiguity [or silence] constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.”²² The fatal flaw with this contention rested on the fact that half of this “implicit delegation” was given to the FCC under the TCPA, not the FTC. The court affirmatively held that Congress did not delegate authority to the FTC necessary to the establishment and subsequent enforcement of the do-not-call list.²³

The court immediately took aim at the broad argument put forth by the FTC and found “unpersuasive the FTC’s argument that aspects of the economy may be regulated by more than one agency as well as the FCC’s argument that congressional silence may itself create an

¹⁸ *Id.* at 1291 (emphasis added); see 47 U.S.C. § 227(c)(3) (2000).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*; see *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²³ *Id.*

ambiguity that calls for *Chevron* deference.”²⁴ The court elaborated its finding based on the *American Bus Association* holding which stated that “Congress’ failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted...[A] statutory silence on the granting of a power is a denial of that power to the agency.”²⁵ Although courts have granted agencies a great deal of leeway under *Chevron* deference, this court narrowed its application.

The FTC took one last gasping breath by relying upon the Consolidated Appropriations Resolution²⁶ and the Do-Not-Call Implementation Act.²⁷ The Consolidated Appropriations Resolution “authorizes the FTC to use, as part of its funding, a certain amount derived from ‘fees sufficient to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule...promulgated under the [TCFAP],’” while the Do-Not-Call Implementation Act “authorizes the FTC ‘to collect fees for the implementation and enforcement of a ‘do-not-call registry.’”²⁸ Essentially, the FTC relied upon the theory that since tax dollars were appropriated to the agency for the implementation of the do-not-call list, Congress had conferred the appropriate power to the agency through fiduciary means. However, “the appropriation must plainly show a purpose to bestow the precise authority which is claimed.”²⁹ In other words, the above-mentioned acts merely demonstrate that legislation reflects the FTC’s act of creating the do-not-call registry, but this is not the same as an unequivocal grant of authority to the FTC “under the TCFAP to promulgate a do-not-call registry.”³⁰

²⁴ *Id.*

²⁵ *Id.*; see *Am. Bus Ass’n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000).

²⁶ Consolidated Appropriations Resolution, Pub. L. No. 108-7, 117 Stat. 11 (2003).

²⁷ Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003).

²⁸ *U.S. Security*, 282 F. Supp. 2d at 1291-92.

²⁹ *Id.* at 1292.

³⁰ *Id.*

Despite the fact that the do-not-call registry had been available for consumer registration as of June 2003,³¹ and had already contained millions of numbers by the time this suit was brought, the court nonetheless refuted every argument put forth by the FTC and sent the do-not-call list to a grinding halt. Though the court did concede that “the elimination of telemarketing fraud and the prohibition against deceptive and abusive telemarketing acts or practices are significant public concerns,”³² it nevertheless ruled that FTC’s power to promulgate rules to eliminate abusive telemarketing acts or practices cannot be exercised through a national do-not-call list.

However, Congress immediately took action by passing legislation allowing for the national do-not-call registry, “effectively rendering moot federal judge’s injunction against registry” which had been granted to the telemarketers in *U.S. Security v. F.T.C.*³³ Within forty-eight hours, Congress drafted this legislation specifically authorizing the FTC to promulgate the do-not-call list. The bill passed 95-0 in the Senate and 412-8 in the House.³⁴ Some lawmakers deemed it the “This Time We Really Mean It Act.”³⁵ The purpose of the bill was to give the FTC power to carry forward with the do-not-call list, and especially cure any misunderstanding in the judicial branch, but this quick fix was short lived.³⁶ Just two days after the *U.S. Security v. FTC* ruling, telemarketers filed suit against the FTC alleging issues of unconstitutionality.

³¹ *Consumer Complaints Against Telemarketers Violating the Do Not Call Registry Reach 37,000*, Oct. 24, 2003, at <http://www.ftc.gov/opa/2003/10/dnc031024.htm> (last visited Jan. 1, 2004).

³² *U.S. Security*, 282 F. Supp. 2d at 1292.

³³ Sheryl Stolberg, *Do-Not-Call Listing Remains Up In Air After Day of Twists*, N.Y. TIMES, Sept. 26, 2003, available at <http://query.nytimes.com/gst/abstract.html?res=F10615FF39590C758EDDA00894DB404482> (last visited Jan. 1, 2004).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

II. Constitutional Scrutiny

Congress mistakenly assumed the problem was fixed after passing this new bill. In Colorado, the same circuit court that decided *U.S. Security* struck down the do-not-call list yet again. This time, Congress had no power to overrule a constitutional decision, much less grant the power to the FTC needed to enforce the do-not-call list. In *Mainstream Marketing Services, Inc. v. FTC*, the telemarketers vehemently argued that the FTC's actions implicated First Amendment issues and attacked the FTC's amended TSR as an act of "regulatory imperialism."³⁷ The first issue was whether the FTC imposed a prior restraint by government on speech. The second issue centered on content-based discrimination because the FTC allegedly "established a mechanism by which a consumer may refuse commercial, but not other types of, speech."³⁸ The telemarketers tried to win on both issues by arguing that the government failed to establish a substantial interest in support of the regulation on commercial speech, that such restriction does not directly and materially advance the FTC's interest in preventing abusive practices by telemarketers, and that the regulation is not narrowly tailored.³⁹ Finally, the plaintiffs argued that the FTC's promulgation of the amended TSR and the fee provisions are arbitrary and capricious because the rules are unsupported by the record and comments that were before the FTC at the time of promulgation.⁴⁰

On the first issue concerning governmental restraint on commercial speech, the FTC claimed "that any burden imposed on commercial speech by the do-not-call registry is imposed by the actions of *individual consumers* rather than the government."⁴¹ In other words, the FTC

³⁷ *Mainstream Mktg., Inc. v. FTC*, 283 F. Supp. 2d 1151, 1158-59 (D. Colo. 2003).

³⁸ *Id.* at 1160.

³⁹ *Id.* at 1163; *see also* *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564-65 (1980).

⁴⁰ *Id.*

⁴¹ *Id.* (emphasis added).

absolutely denied any control over consumers' decision to block telemarketing calls using the do-not-call list. In fact, the FTC argued, "the do-not-call registry...does not implicate First Amendment concerns because the government is not sufficiently involved in determining what speech an individual does and does not hear."⁴² Therefore, it would seem logical that the FTC is not actively restraining the telemarketers' commercial speech when the control lies in the hands of consumers. The court did concede that the TSR amended rules "do not restrict speech by explicitly and directly limiting" or restraining such speech.⁴³ Nevertheless, the court held "that the do-not-call registry sufficiently involves the government in the regulation of commercial speech to implicate the First Amendment."⁴⁴ Elaborating on this holding, the court stated that "the fact that the do-not-call registry is not an outright government ban on commercial speech does not mean that it is not a burden implicating the First Amendment."⁴⁵ Therefore, the FTC was found to have intruded upon and burdened commercial speech to a significant extent, both of which implicate the First Amendment regarding prior restraint on speech.

The second constitutional issue argued by the telemarketers dealt with content-based discrimination. Since the FTC exempted charitable solicitors and various other organizations, it has essentially "imposed a content-based limitation on what the consumer may ban from his home."⁴⁶ Even though the consumer has the choice to register on the list, "the government has removed the absoluteness of that autonomy by itself exempting certain types of speech from the

⁴² *Id.*

⁴³ *Id.* at 1162.

⁴⁴ *Id.* at 1163; *see* *Rowan v. U.S. Post Office Dep't.*, 397 US 728 (1970). The FTC based its argument on the *Rowan* holding which stated that an individual has the right to prevent certain material from entering his home by instructing the local postmaster to instruct the sender of the mail to remove his name off the mailing list. *Id.* at 738. However, the *Mainstream* court distinguished *Rowan* from this case by pointing out that the intended purpose of the statute in *Rowan* "was to eliminate governmental involvement in any determination concerning the content of the materials and to allow the addressee complete and unfettered discretion in electing what speech he desired to receive." *Mainstream*, 283 F. Supp. 2d at 1162.

⁴⁵ *Mainstream*, 283 F. Supp. 2d at 1163; *see also* *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000).

⁴⁶ *Mainstream*, 283 F. Supp. 2d at 1163.

restrictions of the registry.”⁴⁷ Such “picking and choosing” among protected types of speech amounts to governmental entanglement which imposes a significant burden on commercial speech.

Another question remaining for the court to decide is whether the FTC’s do-not-call list is justified by a substantial governmental interest and whether the amended TSR materially and substantially advances this interest. Using an intermediate scrutiny test, the court considered the FTC’s interest in protecting the privacy of consumers’ homes from unwanted communications.⁴⁸ Since “individuals are not required to welcome unwanted speech into their homes and that the government may protect this freedom,”⁴⁹ the FTC’s interest in preventing unwanted speech in the sanctity of consumers’ homes is justified. Additionally, since the FTC has the power to prevent deceptive and abusive telemarketing tactics, another substantial governmental interest, any restriction placed on commercial speech should be constitutional. Furthermore, the FTC projected that a “forty to sixty percent reduction in unwanted telemarketing calls” would significantly reduce the invasion of telemarketers into the privacy of consumers’ homes.⁵⁰ The telemarketers argued that the FTC’s interest in preventing such invasion is not furthered by restricting commercial speech while simultaneously permitting charitable and political speech.⁵¹ Though the FTC realized this contradiction, it attempted to justify the distinction by arguing that charitable or not-for-profit organizations “are less likely than for-profit entities to engage in abusive practices because the consumer is both a potential donor...or volunteer for the charity.”⁵² The court rejected this argument since the FTC failed to produce records or other evidence

⁴⁷ *Id.*

⁴⁸ *Id.* at 1164.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1165.

⁵¹ *Id.* at 1166.

⁵² *Id.*

substantiating that commercial telemarketers tend to be more aggressive than charitable telemarketers.⁵³ The court concluded that “[t]he importance of repeat business provides a commercial telemarketer with an incentive to act in a responsible and decorous manner which is as strong as the incentive possessed by a charitable telemarketer.”⁵⁴ The FTC’s other arguments that charitable speech has heightened First Amendment protection when compared to commercial speech and that “a distinction between commercial and charitable speech based on content” is not necessarily content-based discrimination, but rather secondary effects, were also rejected by the court.⁵⁵

III. FTC’s Stay Denied

After the catastrophic loss by the FTC, the government immediately made a motion to the district court to stay the proceeding until the decision could be appealed to the Tenth Circuit.⁵⁶ The court used a set of factors to determine if the stay was warranted. These factors included whether the stay would substantially injure other parties interested in the proceeding, whether the FTC would suffer irreparable injury, whether the public interest would be harmed if the court denied the stay, and whether the FTC has shown that it will likely succeed on the merits on appeal.⁵⁷ The court analyzed each factor from the view point of both parties.

The court first looked at whether there would be substantial injury to other parties interested in the proceeding. The telemarketers had a legitimate and substantial argument. They contended “that they and their employees will meet with concrete, significant economic harm if

⁵³ *Id.* at 1167.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ See Consolidated Opening Brief of Appellant Federal Trade Commission, *available at* www.ftc.gov/os/2003/10/mainstreambrief.pdf (last visited Jan. 1, 2004).

⁵⁷ *Mainstream Mktg. Servs., Inc. v. FTC*, 284 F. Supp. 2d 1266, 1269-72 (Colo. 2003).

the court stays its injunction and allows the FTC to effect the do-not-call registry.”⁵⁸ Even though “the plaintiffs purport to quantify the loss by claiming that two million jobs will be lost, the court finds nothing in the record which justifies this specific inference.”⁵⁹ However, the court must consider the “plaintiffs’ contention against what the FTC has offered in response—nothing.”⁶⁰ Given these circumstances, the court found the argument of the telemarketers to be quite general, but found no response from the FTC.

The court then evaluated the irreparable injury suffered by the FTC. The court noted that “[t]he intrusion upon residential privacy at issue here is the ringing of a telephone.”⁶¹ Furthermore, “[t]hat ringing may be more frequent than the consumer would like.”⁶² Nevertheless, the court stated that this mere inconvenience is not enough evidence needed to conceive of how any economic damage or infliction of physical injury can exist due to frequent ringing of a consumer’s phone.⁶³ In other words, the court could not equate economic harm with inconvenience, so the FTC lost on this argument.

Without irreparable injury, the question then turned to whether there would at least be harm to the public. The court stated that “[p]lacing to one side the demonstrably false and patently illogical premise that prohibiting calls from only *commercial* telemarketers will ‘halt’ unwanted calls from the other telemarketers and other mass callers exempted from regulation by the FTC, the FTC’s view of the public interest is too short-sighted and ephemeral.”⁶⁴ The court conceded that there might be public harm, however, the FTC approached the issue too narrowly

⁵⁸ *Id.* at 1269.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 1270.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 1271.

and thus the court could not warrant a ruling that public harm existed. Furthermore, the FTC could not overcome the fact that some telemarketers would still be exempted.

Lastly, the FTC had to show the court that the government was likely to win on the merits on appeal. The court looked at all the issues from a totality of circumstances and the premise behind the FTC's argument. The court found the FTC's argument to be circular.⁶⁵ For instance, the FTC asserted that since it "has always made illogical distinctions based on the content of speech in its telemarketing rules, it can continue to make these distinctions."⁶⁶ As a result, the court essentially ruled that since the FTC was trying to rely on the same flawed argument throughout the proceedings, there was no evidence that the FTC was likely to win on appeal.⁶⁷

Conclusion

The FTC has since gained one victory in this vicious fight. The Tenth Circuit Court of Appeals granted the FTC a stay on the injunction halting the do-not-call list, with a hearing set on November 10, 2003 in Tulsa, Oklahoma.⁶⁸ The Tenth Circuit has yet to make a decision on the issue. The telemarketers, however, will be more than ready to punch holes in the argument of the FTC. For example, in the appellate case before the Tenth Circuit, the telemarketing industry added to the argument that the do-not-call list amounts to nothing but a revenue-based taxation on free speech because companies have to pay in order to obtain the list.⁶⁹ This is a battle that will likely continue on the path to the United States Supreme Court.

While the FTC and the rest of the country have been waiting for the appellate court decision, the FTC has not wasted any time flexing its muscle. On November 3, 2003, the FTC

⁶⁵ *Id.* at 1274.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1273-75.

⁶⁸ *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 861 (10th Cir. 2003).

⁶⁹ Ryan J. Foley, *Appeals Court Clears the FTC to Enforce Do-not-call Registry*, WALL ST. J., Oct. 8, 2003, at A3.

proposed a fine of \$780,000 for a violation by AT&T for soliciting twenty-nine consumers on seventy-eight separate occasions.⁷⁰ Furthermore, due to the new outgrowth of the do-not-call list, the FTC has implemented monitor devices to investigate and prevent scams that allegedly charge consumers to place their phone numbers on the do-not-call list, which is a free service.⁷¹ Unless the Tenth Circuit changes the status of the do-not-call list, consumers can still register and file complaints through the FTC.⁷² If the litigation concerning the do-not-call list ends with the FTC gaining full power to enforce this list, violations of the agency's do-not-call policies could cost companies millions of dollars in fines.

⁷⁰ See Do-Not-Call List Timeline, available at www.epic.org/privacy/telemarketing/dnc/ (last visited Jan. 1, 2004).

⁷¹ See Fraud on the Line: Avoiding "Do Not Call" Scams, available at <http://www.ftc.gov/bcp/online/pubs/alerts/dncregalrt.htm> (last visited Jan. 1, 2004).

⁷² See <http://www.ftc.gov/bcp/online/edcams/donotcall/index.html> (providing a three step process to register phone numbers on the do-not-call list) (last visited Jan. 1, 2004).